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No._____

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THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Petitioners,

v.

MICHAEL I. SELZER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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No._____

IN THE SUPREME COURT OF THE UNITED STATES
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MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Petitioners,

v.

MICHAEL I. SELZER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

QUESTION PRESENTED

Whether the covert association of a professor in the City University of New York with the Central Intelligence Agency, which association was unrelated to his functions as a college professor, constitutes the type of association protected by the First Amendment.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Amendments Involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	19
App. A	1A
App. B	20A
App. C	22A
App. D	23A

TABLE OF AUTHORITIES

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209, reh. den., 433 U.S. 915 (1977)	13
Bates v. City of Little Rock, 361 U.S. 516 (1960)	13
Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964)	14

TABLE OF AUTHORITIES

Page

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)..... 19

Garcia v. Texas State Board of Medical Examiners, 421 U.S. 995 (1975), aff'g mem. 384 F. Supp. 434 (W.D. Tex. 1974)..... 15

Healy v. James, 408 U.S. 169 (1972).. 14,17

In Re Primus, 436 U.S. 438 (1978).... 14,17

Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)..... 8,12

NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449 (1958)..... 13,14

NAACP v. Button, 371 U.S. 415 (1963)..... 14,15

Ohralik v. Ohio State Bar Assn., 436 U.S. 447, reh. den. 439 U.S. 883 (1978)..... 15

Pickering v. Board of Education, 391 U.S. 563 (1968)..... 17,18

Shelton v. Tucker, 364 U.S. 479 (1960)..... 13

Sweezy v. New Hampshire, 354 U.S. 234 (1957)..... 10

TABLE OF AUTHORITIES

Page

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)..... 16

United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967)..... 14

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)..... 14

Fluker v. Alabama State Board of Education, 441 F.2d 201 (5th Cir. 1971)..... 19

Moore v. Winfield City Board of Education, 452 F. 2d 726 (5th Cir. 1971)..... 19

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra) is reported at 629 F. 2d 809. The opinion of the District Court (App. D, infra) is reported at 447 F. Supp. 686 (E.D.N.Y. 1979).

JURISDICTION

A timely petition for rehearing was denied on November 7, 1980 (App. B, infra). The order of the Court of Appeals staying the issuance of the mandate was entered on November 19, 1980 (App. C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Rule 22 (3) of the Rules of the Supreme Court.

CONSTITUTIONAL AMENDMENTS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of greivances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

(1)

In the fall of 1977, the respondent Michael Selzer ("Selzer"), then an untenured assistant professor of political science

at Brooklyn College of the City University of New York, was denied reappointment with tenure and promotion. He brought this civil rights action pursuant to 42 U.S.C. §§1983, 1985(3), 1986 and the 14th Amendment. Named as defendants were, among others, the Board of Higher Education of the City of New York and six of Selzer's colleagues in the Department of Political Science, who are the petitioners herein.

Selzer claimed that the petitioners acted to cause his denial of tenure because of his association with the Central Intelligence Agency (C.I.A.) in violation of his First Amendment rights. At trial the following undisputed facts were established.

In November, 1975, Selzer approached the C.I.A. in an effort to obtain resource material for his research in psychopolitics,

particularly modern day terrorism. (Tr. 66, 68-69, 88-89).* Selzer's representations apparently induced the agency to arrange a meeting between him and a C.I.A. agent from its Domestic Collections Division (Tr. 70-71, 193, 625, 642). This division recruits academics and other civilians to provide the C.I.A. with military, economic, political or scientific information gathered abroad (Tr. 620, 625). Selzer was scheduled to go to Europe shortly after this meeting for the stated purpose of conducting academic research (Tr. 83).

Only months before this trip, Selzer had approached two of the petitioners (Frey-Wouters and Weiss) in an effort to

*References in parentheses are to the trial transcript submitted to the Court of Appeals as part of the Record on Appeal.

solicit European academic research contacts through their personal referrals (Tr. 65-66). Selzer succeeded in obtaining and utilizing such resource people through the efforts of professor Weiss (Tr. 64).

In November, 1976 when Selzer's colleagues in the department became aware that he had some contact with the C.I.A. he was asked to explain the nature and extent of his relationship. Selzer refused, saying it was none of their business (Tr. 756-57, 962, 1092-93, 2006).

The disclosure of Selzer's contacts with the C.I.A. sparked a heated debate within the Political Science Department concerning the legitimacy of such a relationship for members of an academic community (Tr. 2912, 3296). Thereafter, Selzer was considered for promotion and

reappointment with tenure but this application ultimately was not approved by the college.

In his complaint Selzer alleged that his association with the C.I.A. was constitutionally protected and a substantial or motivating factor that affected the personnel decisions concerning him at the college.

At the close of the plaintiff's case, the defendants moved to dismiss on the grounds that plaintiff's activities on behalf of the C.I.A. were not within the scope of conduct protected by the First and Fourteenth Amendments.

The District Court judge denied the motion without opinion and indicated that whether Selzer's conduct was constitutionally protected was a question for the jury. No such question ever went to the jury and no instruction was given thereon. 629 F.2d 809 footnote 2 at 814, 815.

A verdict was returned in favor of the plaintiff in the amount of $580,000 in damages and attorneys fees and disbursements of $493,524. Defendants thereafter moved for judgment notwithstanding the verdict, on the ground, inter alia, that Selzer's conduct was not constitutionally protected. This motion was denied. 447 F. Supp. 686 (1979).

(2)

On appeal to the Court of Appeals for the Second Circuit, the judgment of the district court was vacated and the case was remanded for a new trial based on reversible error found in the instruction to the jury under Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977).

The opinion of Judge Kaufman, concurring in part and dissenting in part, concurred in the majority's decision to

reverse but dissented from their decision to remand for a new trial. Judge Kaufman concluded as a matter of law that the plaintiff's conduct was not constitutionally protected and therefore, the complaint should have been dismissed. 629 F.2d at 814-17 (1980).

REASONS FOR GRANTING THE PETITION

The constitutional questions presented by this petition arises from a conflict between government and the American academic community over the scope and the proper exercise of the right of academic freedom. Whether an academic's covert association with a government intelligence gathering organization is constitutionally protected as a form of First Amendment expression is of compelling concern to all colleges and universities. Without guidance as to the

protected nature of such conduct, the uncertainty, suspicion and distrust in college communities that is caused by the Central Intelligence Agency's covert intrusion on campus will continue to disrupt educational institutions.

In Sweezy v. New Hampshire, 354 U.S. 234 (1957), this Court, in holding that academic freedom was within the scope of the First Amendment, stated (p. 250):

> "No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The petitioners herein are social scientists whose academic lives have been

threatened by the assertion of civil liability for their inquiry into and their alleged protests against the intrusion of the C.I.A. into their department. One of their colleagues, the respondent Michael Selzer, used them and their research contacts abroad to further his own scholarship. This is a common and encouraged practice within a college department. However, without informing his colleagues, Selzer approached the C.I.A. to assist him in his research as well, and subsequently provided this agency with information he had gathered during a research trip to Europe. In so doing, Selzer's covert conduct jeopardized and potentially compromised the European research contacts of others in his department. Once Selzer's activities came to be

known to his colleagues and he chose not to disclose the nature and extent of his relationship with the C.I.A., the Political Science Department of Brooklyn College was severly disrupted. As Judge Kaufman stated in his opinion in the instant case (629 F.2d 809, at 814):

> "From the moment word of Selzer's involvement with the agency first circulated among Department members until a decision was finally reached, it appears the Department transacted little other business than to deal with the tempest created by his activities."

Judge Kaufman recognizes that, under Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), a threshold determination must be made whether the subject conduct is constitutionally protected. However, as Judge Kaufman notes "the majority simply assumes, without deciding, that Selzer's activity is protected by the first amendment".

629 F.2d at 814. And further noted that the district court had also failed to consider this threshold constitutional issue. Petitioners urge the Court to take this opportunity to review the constitutional issues left unresolved in Judge Kaufman's view.

(1)

Selzer's activities are not entitled to protection as expression or association under the First Amendment.

Since NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449 (1958), Bates v. City of Little Rock, 361 U.S. 516 (1960) and Shelton v. Tucker, 364 U.S. 479 (1960) this Court has recognized the "right of association." But this right is not absolute. It is not a constitutionally protected, unfettered right to engage in all group activities regardless of the nature of purposes of such associations.

Accord, Abood v. Detroit Board of Education, 431 U.S. 209 (1977). In order for an individual's association with a group to be protected, the organization must be engaged in constitutionally protected activities such as the promotion of religious, political or other ideological causes. NAACP v. Alabama, 357 U.S. 449 (1958). The right protected by the First Amendment is "the right of individuals to associate to further their personal beliefs". Healy v. James, 408 U.S. 169, 181 (1972); In Re Primus, 436 U.S. 438 (1978).

In NAACP v. Button, 371 U.S. 415, 429-430 (1963), the Court found that lawsuits are "a form of political association" and thus held that group activities designed to promote lawsuits are protected.

See also, United Transportation Union v. Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964). In contrast, this Court upheld state interference with group medical practice. Garcia v. Texas State Board of Medical Examiners, 421 U.S. 995 (1975), aff'g mem. 384 F. Supp. 434 (W.D. Tex. 1974). In NAACP v. Button and Garcia, associational activity was intended to provide adequate service to the public at a non-prohibitive cost; the only distinguishing factor is that group medical practice cannot be linked to freedom of speech or political activity, while litigation is obviously closely tied to both. See NAACP v. Button, supra, 371 U.S. at 429.

Applying the principles set forth above to the instant case, the complaint should have been dismissed as a matter of law. Selzer's conduct was not in furtherance of his own personal belief but rather he instituted actions taken in pursuit of personal goals. Under such circumstances, the conduct is not protected by the First Amendment.

(2)

Assuming, arguendo, that the respondent's activities with the C.I.A. were a form of association or expression entitled to protection of the First Amendment, it is submitted that such rights must be balanced with the rights of the petitioners. Since the majority opinion below refused to apply the balancing test, review by this Court is essential.

First Amendment claims must always be adjudicated in light of special characteristics of the environment involved in the particular case. Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969);

Healy v. James, 408 U.S. 169, 180 (1972).

The majority opinion of the Court of Appeals fails to address the special circumstances involved in this case. To allow Selzer to be compensated for his conduct, is to ignore and thus destroy, the special environs of the college community by eroding its underpinnings of collegiality and academic freedom, all without consideration or comment.

As Judge Kaufman states "the right to associate freely is not absolute, particularly where its exercise conflicts with the duties and responsibilities of a governmental employee". 629 F.2d 809 at 815, citing Pickering v. Board of Education, 391 U.S. 563 (1968). The determination as to whether a government employee's speech is constitutionally protected expression requires "striking a balance

between the interests of the teacher, as citizen, in commenting upon the matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees." Id. at 568. The balance to be struck under Pickering, supra, would necessarily require a determination as to whether any protected interest Selzer might have in a covert relationship with the C.I.A. becomes subservient to the academic freedom rights of his faculty colleagues at Brooklyn College. An academic community depends on a free and open interchange of ideas, data and information. Basic to that interchange are close working relationships among colleagues founded on mutual trust, confidence and loyalty. Covert relationship with

an intelligence gathering organization would necessarily hinder debate and the robust exchange of ideas and information.

Covert association with intelligence gathering organizations would necessarily impair rapport with colleagues, a consideration which has been upheld repeatedly as a valid factor in assessing a professor's value. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Fluker v. Alabama State Board of Education, 441 F. 2d 801, 807 (5th Cir. 1971); cf. Moore v. Winfield City Board of Education, 452 F. 2d 726, 728 (5th Cir. 1971).

The balancing of the competing interests between Selzer and his colleagues in determining whether the plaintiff has stated a claim under the First Amendment requires the resolution of a question of law. In remanding the matter for a new

trial, the Court of Appeals has improperly held that this is an issue of fact to be resolved by a jury.

CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORARI SHOULD BE GRANTED.

February 5, 1981

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1030—September Term, 1979

(Argued March 21, 1980 Decided August 6, 1980)

Docket No. 79-7776

MICHAEL I. SELZER,

Plaintiff-Appellee,

—against—

MARTIN FLEISHER, DAVID W. ABBOTT, NATHAN SCHMUKLER, DONALD R. REICH, JOHN W. KNELLER, and HAROLD M. JACOBS, Chairman, and EDITH B. EVERETT, RONALD T. GAULT, JACK JOHN OLIVERO, DAVID Z. ROBINSON, PATRICIA CARRY STEWART, LORETTA A. CONWAY, WALTER H. CROWLEY, ARMAND D'ANGELO, GURSTIN D. GOLDIN, ALBERT V. MANISCALCO, DAVID VALINSKY, EMANUEL R. PIORE, JOAN B. MAYNARD, JOAQUIN RIVERA and EDWARD A. ROBERTS, Members of the Board of Higher Education of the City of New York, and ROBERT J. KIBBEE, Chancellor of the City University of New York,

Defendants;

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Defendants-Appellants.

Before:

KAUFMAN, TIMBERS, *Circuit Judges*,
and LASKER, *District Judge.**

Appeal from a judgment of the District Court for the Eastern District of New York, Thomas C. Platt, J., after a jury trial, finding six individual defendants liable for damages, attorneys fees and costs for violation of plaintiff's constitutional rights by voting to deny him tenure or promotion at Brooklyn College.

Judgment vacated and case remanded for new trial.

DONOVAN, LEISURE, NEWTON & IRVINE, Esqs., New York, New York (Walter L. Stratton, Esq., G. Russell Miller, Esq., E. Lauren Holmes, Esq., Of Counsel) *for Plaintiff-Appellee.*

ALLEN G. SCHWARTZ, Corporation Counsel of the City of New York (L. Kevin

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* Hon. Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

Sheridan, Esq., Diane R. Eisner, Esq., Richard Bowers, Esq., Patrick F. X. Mulhearn, Esq., Peter J. Kurshan, Esq., Of Counsel) *for Defendants-Appellants.*

LASKER, D.J.

I.

During the fall of 1977, Michael Selzer, then a political science professor at Brooklyn College, was denied tenure and promotion. He brought this action against various individuals and the New York City Board of Higher Education, alleging that the defendants acted to cause the denial because of his contacts with the United States Central Intelligence Agency (CIA) in violation of his First Amendment rights of freedom of expression and association.

Selzer had been enthusiastically recommended by the appropriate committees in the political science department and the School of Social Science for promotion from Assistant to Associate Professor in the Spring of 1976. Selzer, who specializes in the area of psychopolitics and was then studying the psychology of Nazi leaders, had contacted the CIA to inquire about access to data possessed by that agency, and agreed to the CIA's request to "debrief" him after he returned from a research trip to Europe in the summer of 1976. Upon his return, in a telephone conversation which lasted ten to fifteen minutes, Selzer gave a CIA officer information as to his observations on his trip.

Selzer's action became known to other members of the political science department during the Fall of 1976

and to the press that winter. In May 1977, the Appointments Committee of the political science department voted to deny Selzer tenure, and the department's Promotions Committee, in contrast to their 1976 action, voted against his promotion. The 1977 report of the chairman of the department also recommended against granting Selzer tenure. At each level of the hierarchy of committees at Brooklyn College involved in the tenure and promotion processes, the subsequent votes were against Selzer. Finally, the President of Brooklyn College decided not to recommend to the Board of Higher Education that Selzer be tenured, thereby terminating the process.

Selzer alleged that the negative votes on his tenure and promotion candidacies were based not on his academic qualifications but on his association with the CIA, and that the individual defendants conspired to deny him tenure. The appellants claimed that they were merely expressing their views as to Selzer's involvement with the CIA and that their actions were not intended to punish him for the exercise of his First Amendment rights.

After a nine week trial the jury returned a verdict for $580,000 against six individual defendants who sat on the tenure and promotion committees of the political science department. The other defendants were found to have acted in good faith. In response to special interrogatories, the jury found that the plaintiff proved that his association with the CIA was "a substantial or motivating factor in the determination to deny [him] tenure or promotion"; that the defendants as a group had not shown that without such association Selzer would have been denied tenure or promotion; and that the six defendants-appellants who had caused or

contributed to the denial of Selzer's tenure or promotion had not acted in good faith.

After trial the district judge entered a judgment for the amount awarded by the jury together with an award of $433,458.73 in attorneys fees and expenses, and $60,065.83 in costs. The judgment was modified to substitute the Board of Higher Education as judgment debtor in lieu of the six individuals. The Board and those individuals have appealed to this Court.

II.

Appellants claim several errors below. We deal at the outset with those claims which we find without merit.

Appellants argue first that the First Amendment precludes recovery against them because the imposition of damages punishes them for engaging in what they characterize as "pure speech," that is, for merely expressing their views about Selzer's CIA involvement. This contention is based on an inaccurate characterization of the facts. The jury found appellants' conduct caused and was intended to cause the deprivation of Selzer's constitutional rights. Clearly, the First Amendment does not shield such conduct.

Appellants also contend that since the actual decision as to tenure was made by the President of Brooklyn College alone, the actions of the members of the Tenure and Promotion Committees could not have proximately caused Selzer's injury.[1] However, the jury was properly instructed as to the principles of causation and

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1. It might be argued, although appellants do not, that the jury charge misstated the law as to causation by setting too low a level of proof required for liability. The jury was charged

(footnote continued on next page)

concluded that appellants' actions were a proximate cause of the denial of Selzer's tenure. There was sufficient evidence to support that finding, including the testimony as to the weight given to the votes—particularly when negative—of the Tenure and Promotion Committees of the department by those who participate in the upper levels of the multi-tiered decisionmaking at Brooklyn College. *See Haimowitz v. University of Nevada*, 579 F.2d 526, 530 (9th Cir. 1978).

Appellants claim that, as a matter of law, they are entitled to good faith immunity under *Wood v. Strickland*, 420 U.S. 308 (1975), because without any prior judicial decision holding similar conduct to be actionable, they had no reason to know that they were violating Selzer's constitutional rights. We disagree. A prior judicial decision holding conduct such as appellants' to be a basis for suit was not necessary to apprise

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"before you can find liability against these defendants, you must find that it was their actions that caused *or contributed to* the denial of tenure and/or promotion."

(Tr. 6280) (emphasis added). While, in our opinion, this language casts too broad a net and should have omitted the italicized phrase, it does not constitute reversible error in light of the other instructions given the jury which correctly stated the test for causation established in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977):

"In order to prove his claim the plaintiff must show by a preponderance of the evidence that his association with the C.I.A. was a substantial or motivating factor in the decision to deny him tenure and promotion."

(Tr. 6278). Moreover, by special interrogatory which was answered affirmatively, the jury was asked

"Did plaintiff prove, by a preponderance of the evidence, that his association with the CIA was a substantial or motivating factor in the determination to deny plaintiff tenure or promotion?"

them of a rule which should come as no surprise, that is, that conduct which denies a person promotion or tenure because of his private associations violates his First Amendment rights and is accordingly actionable.

Appellants contend that two evidentiary rulings of the court below constituted reversible error: (1) the court's refusal to admit into evidence two outside evaluations of Selzer's scholarship during cross-examination of defendants (who testified that they relied on those evaluations in deciding to vote against Selzer's tenure or promotion), and (2) the exclusion of the evaluations of certain Brooklyn College political science professors who were colleagues of Selzer. The evaluations were prepared by Selzer's expert and fact witness, Professor Dankwart Rustow, and were as laudatory of the other professors as Rustow's evaluation of Selzer.

Appellants argue that the admission of these reports would have demonstrated to the jury the undependability of Rustow's praise of Selzer. These rulings did not constitute an abuse of the trial judge's discretion. Viewing the record as a whole, the trial court's determination, although disappointing to appellants, did not prejudice them. As to the first item, the evaluations in question were admitted in evidence later in the trial, and during summation defense counsel had the opportunity to argue their significance to the jury. As to the second, the materials offered were of marginal relevance. Moreover, although the evaluations were not admitted, defense counsel were permitted the functional equivalent of questioning Rustow about his evaluations of other professors. (Tr. 4552)

Appellants next claim that the district judge erred by failing to charge the jury as to when Selzer's due

process rights attached. However, Selzer did not claim he was denied his due process rights but that his First Amendment rights had been violated, and those rights did not "attach" at a specific time. Accordingly, the charge urged by appellants would have been inappropriate.[2]

We also find to be without merit the contention that the court's charge was insufficient on the subject of Selzer's duty to mitigate damages. Appellants argue that although the judge instructed the jury that,

> "It is the duty of any person who has been injured to use reasonable diligence and reasonable means under the circumstances to prevent the aggravation of such injuries and to effect a recovery therefrom."

(Tr. 6306-07), it was erroneous to refuse to charge the particulars of the responsibility to mitigate. Selzer responds that defendants failed to meet their burden of introducing evidence showing that he did not attempt to mitigate, and that therefore, "probably no charge on mitigation at all was proper." We agree that the charge given was sufficient to apprise the jury of Selzer's duty to mitigate. Without evidence in the record showing that Selzer did not attempt to find employment elsewhere, a further charge was not necessary.

Appellants assert that the trial judge's conduct was so biased and prejudicial as to deny them a fair trial. While it is understandable that in such a lengthy and

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2 Appellants assert that violation of Selzer's due process rights was made an issue in the case by repeated references to those rights by Selzer's counsel during trial. However, the jury was neither charged on the subject, asked to determine, nor did it determine whether Selzer's right to due process had been violated by the procedures used in arriving at the tenure or promotion decisions.

controversial trial, the parties may become convinced that the judge was not acting impartially, our review of the record convinces us that the district judge's rulings and behavior were unbiased and that the trial was fairly conducted.

III.

We turn to the dispositive issue on this appeal.

Appellants claim that the trial court's charge was erroneous in failing to instruct the jury that the principles established in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977) applied to each defendant individually.

In *Mt. Healthy,* the plaintiff, a school teacher, alleged that he was not rehired because of a telephone call he had made to a local radio station concerning a dress code for teachers. The district court found the telephone call to be protected by the First and Fourteenth Amendments and that it had played a " 'substantial part' " in the Board's decision not to renew Doyle's employment. Accordingly, it held the plaintiff entitled to reinstatement and backpay. The Supreme Court agreed that the call was constitutionally protected, but vacated and remanded because of the failure to apply the appropriate rule of causation. The Court held that:

> "[i]nitially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District

> Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."

Id. at 287 (footnote omitted).

In the case at hand, the trial court instructed the jury that:

> "If you find that the plaintiff has met [his] burden of proof, then you must determine whether the defendants have shown by a preponderance of the evidence that the plaintiff would have been denied tenure and promotion even if plaintiff's association with the C.I.A. had not been considered."

(Tr. 6278).

The judge then put the following special interrogatory to the jury:

> "Did the defendants prove by a preponderance of the evidence that Michael Selzer would have been denied tenure or promotion even if his association with the CIA had not been considered?"

(App. 119). The jury answered in the negative.

The appellants argue that the charge given was good as far as it went but did not go far enough. They claim that the interrogatory put to the jury was deficient in not asking it to determine whether, as to *each* defendant, his or her decision to recommend against plaintiff's tenure or promotion would have been made even if Selzer had not associated with the CIA. Put another way, the appellants claim that the jury instruction and the special interrogatory actually given were erroneous because they inquired solely as to the

collective actions of the defendants and failed to distinguish the cases of individual defendants. Consequently, they argue, it is impossible to determine whether, if asked, the jury would have concluded that a particular appellant would have acted to cause Selzer's tenure or promotion denial absent his collaboration with the CIA.

Selzer replies that findings as to each defendant are not required for a finding of liability. He contends that *Mt. Healthy* established a test only as to whether the wrongful conduct brought about the alleged injury and has nothing to do with who acted wrongfully.

We agree with the appellants that the charge and interrogatory were insufficient in the circumstances of this case. It is true that *Mt. Healthy* involved only one defendant and that the court did not specify the language to be used in multi-defendant cases. However, there is nothing in the Court's opinion that indicates that the test should not be applied to each defendant individually. To the contrary, the Court's reasoning, which relies primarily on the nature of the decision-making process of "those responsible for the decision to rehire," requires the separate application of the test to each defendant.

> "A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of

those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."

429 U.S. at 285-86. We conclude that the *Mt. Healthy* rule of causation is applicable to each defendant separately and cannot be satisfied by a finding as to the defendants collectively.

Accordingly, we hold that each defendant should have been given the opportunity to establish by a preponderance of the evidence that absent Selzer's CIA involvement that defendant would nevertheless have acted in the same way. The failure to charge and interrogate the jury on that point is reversible error.

IV.

Appellants challenge as excessive the trial court's award of attorneys fees in the amount of $433,458.73.[3]

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3 Appellants also argue that no attorneys fees should have been awarded because Selzer's counsel agreed to represent him without a

In the event that the trial court is again called upon to fix attorneys fees, we are confident it will note, as this Court has recently suggested in *Seigal v. Merrick,* Nos. 79-7420, 79-7444, slip op. at 1867 (2d Cir. March 17, 1980), that any award must be proportionate to the result achieved.

The judgment of the district court is vacated and the case remanded for a new trial.

KAUFMAN, *Circuit Judge* (concurring in part and dissenting in part):

I concur in the majority's decision to reverse the judgment entered for Selzer in the district court,[1] but I emphatically dissent from its decision to remand the case for a new trial. In my view, the majority simply assumes, without deciding, that Selzer's activity is protected by the first amendment.[2] Since a fuller

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fee and he would not have been deterred from pressing his claims without an assurance of payment of his attorneys fees. We find no merit in this contention.

1 Where, as here, a disappointed candidate for tenure seeks money damages, and not reinstatement, from those individuals who considered his qualifications and participated in the decision to deny his application for tenure, I fully agree with the majority that each defendant must be accorded an independent opportunity to prove that he would have voted to deny tenure even if the plaintiff's protected conduct or speech had not entered into his consideration. Determination of which, if any, of the defendants would have voted to deny tenure despite the plaintiff's protected activity should not end the inquiry, however. Rather, the trier should then proceed to determine whether there would have been sufficient opposition to the application, untainted by improper considerations, to have caused the denial of which the plaintiff complains.

2 The district court also failed to resolve whether Selzer possessed a protected interest in his association with the CIA. Following

assessment of the conflicting interests here at issue demonstrates that Selzer's conduct does not merit constitutional protection, I am forced to conclude that the question of appellants' liability should never have been presented to the jury. Accordingly, I would reverse the judgment for the appellee and dismiss the complaint.

Although not expressly set forth in the Constitution, a right of free association has been implied from the freedoms of speech, assembly, and petition explicitly guaranteed by the first amendment. *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Healy* v. *James*, 408 U.S. 169 (1972); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971). Like these express guarantees, however, the right to associate freely is not absolute, particularly where its exercise conflicts with the duties and responsibilities of a governmental employee. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

In *Pickering*, a public high school teacher was dismissed for publishing a letter in a local newspaper critical of the budget adopted by her employer, the board of education. After balancing the interest of the teacher, as a citizen, in her expression, with the interest of her employer in promoting the efficiency of the

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presentation of the appellee's case, appellants moved to dismiss the complaint arguing, *inter alia*, that Selzer had failed to demonstrate that his involvement with the CIA merited constitutional protection. The district court rejected this argument, stating that the question presented an issue for the jury. But, when the district judge submitted the case to the jury, he neglected to instruct it to determine whether Selzer's association with the CIA merited constitutional protection. In any event, the question presents an issue of law for resolution by the court, and not the jury. *See Bernasconi* v. *Tempe Elementary School District No. 3*, 548 F.2d 857, 862 (9th Cir. 1977).

public services it performed, the Court concluded that the teacher's interest in free expression outweighed the school board's asserted interest in preserving harmonious relations between faculty and administrators. *Pickering, supra,* 391 U.S. at 569-74. *See also Givhan* v. *Western Line Consolidated School District,* 439 U.S. 410, 414 (1979); *Mt. Healthy City School District* v. *Doyle,* 429 U.S. 274, 284 (1977). In striking the proper balance in future cases, however, the Court clearly suggested that a contrary result would follow if it were shown that an employee's actions actually disrupted close working relations between members of the employer's staff. *Pickering, supra,* 391 U.S. at 570 n.3.

In applying the guidelines laid down by *Pickering,* the courts of this Circuit have looked principally to the disruptive impact of an employee's conduct or speech upon his co-workers. In *Lefcourt* v. *The Legal Aid Society,* 312 F. Supp. 1105 (S.D.N.Y. 1970), *aff'd,* 445 F.2d 1150 (2d Cir. 1971), a Legal Aid attorney contended that he had been illegally discharged by the Society because he had been openly critical of his supervisors' policies. In rejecting Lefcourt's assertion that his criticisms enjoyed constitutional protection, Judge Lasker noted that the attorney's statements had adversely affected the internal operations of his employer, and could reasonably be presumed to continue to do so in the future. *Lefcourt, supra,* 312 F. Supp. at 1112. Since the Society depended "for its effectiveness on the close cooperation and unfettered communication (often confidential) of its staff and superiors," Judge Lasker concluded that the ill-will and disharmony sparked by Lefcourt's criticisms generated a sufficiently important interest in his employer to justify his dismissal. *Id.* at 1113. *See also Simard* v.

Groton Board of Education, 473 F.2d 988 (2d Cir. 1973).

The importance of a governmental employer's interest in maintaining harmonious, effective working relationships among its employees was only recently emphasized by this court in *Janusaitis* v. *Middlebury Volunteer Fire Department*, 607 F.2d 17 (2d Cir. 1979). Janusaitis, a Vermont firefighter, repeatedly criticized his superiors for mismanagement of the department. A protracted squabble ensued, which finally culminated with Janusaitis's dismissal after he publicly accused town officials of an illegal cover-up. Noting the distinction between the rights of an employee, such as Pickering, who merely expressed her views on the public policies and services of her institutional employer, and the rights of one, such as Janusaitis, whose conduct directly threatened his relations with his immediate colleagues and superiors, we rejected the contention that Janusaitis's charges were deserving of constitutional protection. "Carping criticism and abrasive conduct," we said, "have no place in a small organization that depends upon common loyalty [and] 'harmony among coworkers.'" *Id.* at 26 (citation omitted).

Though the actual impact of an employee's actions upon his colleagues is an important consideration in the balance to be struck, it cannot be accorded dispositive weight. Any number of private associations or expressions may in fact disrupt a small, homogeneous office, or incur the hostility of one's co-workers. But the subjective predilections of a majority of the employees ought not be permitted to justify the imposition of a stifling regime for the remainder. Rather, courts must also consider the intensity of the reaction, its likelihood

of recurrence, and especially the degree to which the activities for which the employee claims protection necessarily affects the proper discharge of his professional responsibilities. The President's National Security Advisor obviously can claim no constitutional right both to serve in his sensitive position, and to moonlight as a newscaster. A postal employee, however, may well have a right to just such an association with the media, particularly where he occupies no position of high trust. In short, courts must determine whether the employee's association is antithetical to the performance of his duties, and to those of his colleagues.

In the instant case, there can be no doubt that Selzer's involvement with the CIA was directly relevant to his application for tenure. Since Selzer had evidently decided to exchange information, covertly, with an intelligence agency, other members of the faculty could reasonably question his commitment to the academic endeavor. Though it may well be debatable whether the course Selzer chose advanced scholarly objectives, there can be no doubt that his decision to pursue such a course was relevant—indeed critical—to an informed appraisal of his qualifications for permanent appointment to the faculty. After all, Brooklyn College was seeking a teacher and a scholar, not an espionage agent.

That Selzer's association with the CIA in fact disrupted the orderly operation of the College and particularly its Political Science Department cannot be gainsaid. From the moment word of Selzer's involvement with the agency first circulated among Department members until a decision upon his tenure application was finally reached, it appears the Department transacted little other business than to deal with the tempest created by his activities.

But more to the point, Selzer's conduct was inherently disruptive. Professional respect and mutual trust are essential to the vitality of an intellectual community. The unrestrained interchange of ideas, so necessary for the advancement of human knowledge and understanding, presupposes a commonality of scholarly purpose as well as a willingness to extend, and keep, confidences. By associating with the CIA, Selzer cast doubt upon his scholarly goals and principles. The nature of his association contravened what many colleagues considered to be an acceptable norm of academic behavior, and its likely effect was to inhibit them in their relations with him. Moreover, in refusing to disclose the manner and extent of his involvement with the agency, even after his CIA contact had expressly advised him that he was free to do so, Selzer exhibited a disturbing reluctance to share, and keep, personal confidences. Particularly where, as here, the very nature of his association posed an obvious threat to the scholarly pursuits, both of the College and of his colleagues,[3] Selzer's obstinate refusal to discuss his involvement with the agency evidenced a disdain for his peers that quite naturally evoked in them a similar aversion for him. Although the

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3 Before Selzer first contacted the CIA, he asked a colleague in the Political Science Department, Herbert Weiss, for the names of individuals in Europe who might assist him in his research into Nazi war collaborators. Weiss gave Selzer the name of a close friend in Belgium. Subsequently, after the possibility of Selzer's involvement with the CIA became generally known, Selzer informed the members of the Political Science Department that, if he had any contact with the CIA, it was solely to relay information imparted to him overseas. Though Selzer also stated that he would never compromise his colleagues "by imparting any information they had revealed to [him] or which any source to whom they had directed [him] had revealed to [him]," his refusal to admit the fact of his association with the CIA obviously discredited his assertions.

Department's agitated response was by no means beyond reproach, it was certainly predictable. This is particularly so in view of the "critical importance" of the tenure decision that was about to be made *See Simard, supra,* 473 F.2d at 996.

Courts, of course, must stand ever vigilant lest public employers attempt to mask unwarranted inroads upon an employee's constitutional freedoms under the rubric of disharmony and employee dissension. In the instant case, however, I fail to see how Selzer's conduct could be anything but disruptive and counterproductive to the legitimate ends of his employer. In such circumstances, I believe the appellants' strong interest in preserving collegiality and productive relationships among the Brooklyn College faculty must carry the day, particularly if the goal of affording students a challenging, uninhibited education is to be realized. Accordingly, I would reverse the judgment for Selzer and dismiss the complaint.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of November, one thousand nine hundred and eighty.

MICHAEL I. SELZER,

Plaintiff-Appellee,

v.

MARTIN FLEISHER, DAVID W. ABBOTT, NATHAN SCHMUKLER, DONALD R. REICH, JOHN W. KNELLER, and HAROLD M. JACOBS, Chairman, and EDITH B. EVERETT, RONALD T. GAULT, JACK JOHN OLIVERO, DAVID Z. ROBINSON, PATRICIA CARRY STEWART, LORETTA A. CONWAY, WALTER H. CROWLEY, ARMAND D'ANGELO, GURSTIN D. GOLDIN, ALBERT V. MANISCALCO, DAVID VALINSKY, EMANUEL R. PIORE, JOAN B. MAYNARD, JOAQUIN RIVERA and EDWARD A. ROBERTS, Members of the Board of Higher Education of the City of New York, and ROBERT J. KIBBEE, Chancellor of the City University of New York.

Defendants,

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee and by counsel for defendants-appellants,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL I. SELIER, Plaintiff-Appellee,

v.

MORTON ZEMMOWITZ, et al., Defendants-Appellants.

NOTICE OF MOTION

for STAY OF MANDATE

79-7776

MOVING ATTY: ALLEN G. SCHWARTZ
By: PATRICK F. X. MULHEARN-566-0957

OPPOSING COUNSEL: DONOVAN, LEISURE, NEWTON & IRVINE
By: WALTER L. STRATTON 489-4298

Judge or agency whose order is being appealed: PLATT, J. (E.D.N.Y.)

Brief statement of the relief requested:

The relief requested is an order staying the issuance of the mandate or alternatively, if the mandate has been issued, for its recall.

Previous requests for similar relief and disposition:

None

Statement of the issue(s) presented by this motion:

No other than the consideration of the application for a stay.

Brief statement of the facts (with page references to the moving papers):

See Affidavit filed in support of Appellant's motion.

Summary of the argument (with page references to the moving papers):

See Affidavit filed in support of Appellant's motion.

November 19, 1980

Attorney for PATRICK F.X. MULHEARN

ORDER

IT IS HEREBY ORDERED that the motion

be and it hereby is granted

11/25/80

IRVING R. KAUFMAN

WILLIAM H. TIMBERS, CIRCUIT Judges.

MORTON I. GREENBERG, DISTRICT Judge.

22A

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL I. SELZER,

Petitioner,

-against-

MORTON BERKOWITZ, et al.,

Defendants.

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MEMORANDUM AND ORDER

October 3, 1979

PLATT, D.J.

I

Defendants moved, pursuant to Rule 50 of the Federal Rules of Civil Procedure ("FRCP") for an order granting defendants judgment notwithstanding the verdict or, in the alternative, pursuant to Rule 59 FRCP, for a new trial on the grounds that:

1. The verdict was contrary to the law and the evidence;

2. The verdict was excessive in amount and not supported by the evidence;

3. Defendants were prejudiced by opposing counsel's references in summation to a recent, highly publicized, jury damage award;

4. The verdict was inconsistent with the responses to Special Interrogatory 3(b);

5. The testimony and evidence presented at trial was insufficient as a matter of law, to support plaintiff's burden of proving constitutionally protected conduct was involved.

Defendants' aforesaid motions are denied. No opinion.

II

Subsequent to making the aforesaid motions, defendants moved, pursuant to Rule 62(b) FRCP, (a) for an order staying the enforcement of judgment heretofore entered on May 18, 1979 pending a decision on defendants' aforesaid motion under Rule 50 FRCP for judgment notwithstanding the verdict and (b) for an order directing plaintiff to vacate and/or withdraw all

noticed filed or served pursuant to the New York Civil Practice Law and Rules "to effectuate the enforcement of said judgment". By reason of a stipulation dated and So Ordered September 28, 1979, made between the attorneys for the parties, this second motion is now moot.

III

By Notice of Motion served within seven days of the original judgment entered herein, plaintiff moved pursuant to Rule 59(e) FRCP for an order (a) amending the judgment so as to provide for injuctive relief granting the plaintiff promotion from assistant to associate professor and granting plaintiff tenure in the City University of New York, and pursuant to Rules 59(e) and/or 54(d) of FRCP and Title 42 U.S.C. § 1988 for an order (b) amending

the judgment so as to grant plaintiff costs, including reasonable attorneys' fees and expenses.

(a) Thereafter, because of the defendants unwillingness to negotiate appropriate injunctive relief in the premises plaintiff withdrew the first portion of his motion and pursued only the second half thereof, i.e., his motion for reasonable attorneys' fees and expenses.

(b) With respect to the latter, plaintiff's attorney filed a detailed affidavit, defendants applied for and were granted extensive depositions and other discovery, and a hearing was held by the Court on (i) the issue of whether plaintiff was entitled to attorneys' fees and expenses and (ii) the issue of the reasonableness of plaintiff's attorneys request therefor.

By way of background, plaintiff commenced his lawsuit herein on September 23, 1977, alleging violations of 42 U.S.C. §§ 1983, 1985(3) and 1986, ultimately charging that defendants violated plaintiff's constitutional rights by causing or contributing to the causation of the denials to plaintiff of tenure and promotion at Brooklyn College on account of plaintiff's associating with and speaking to the CIA. The original verified complaint consisted of four counts and was 29 pages in length. Thereafter, the complaint was twice amended and supplemented, one of such amendments taking into account the opinions in Monell v. Department of Social Services, 436 U.S. 658 (1978), and Turpin v. Mailet, 578 F. 2d 152 (2d Cir. 1978), vacated sub nom. City of Westhaven v. Turpin _____ U.S._____, 99 S. Ct. 554 (1978), aff'd

on remand, 591 F.2d 426 (2d Cir. 1979).

Pretrial discovery was, to put it mildly, extensive, both in terms of document discovery and in terms of the number and length of the despositions which were required. During the course of the litigation defendants brought two motions to dismiss; this Court's decision on the first of such motions, is reported in 459 F.Supp. 347 and its decision on the second of such motions was tentatively indicated at the outset of the trial on March 15, 1979 (before the issues contained therein were mooted by the jury verdict). The trial itself commenced on March 19, 1979, and lasted for nine weeks. The verdict was rendered on May 18, 1979. Sixty three witnesses were called and

some 372 exhibits were marked into evidence.[1]

Plaintiff's attorneys kept detailed time records of the time actually spent in counseling the plaintiff prior to the institution of the litigation, in the preparation of the complaints, in the pretrial discovery, in the briefing and argument of the motions, and in the preparation for and the conduct of the trial, the post-trial motions and other post-trial work. They applied their normal billing rates of approximately $125 per hour for partners time and between $27.25 to $65 per hour for associates time and various other

1. Plaintiff offered some 202 of which 140 were received in evidence; defendant offered 268 of which 232 were admitted into evidence.

lesser rates for other summer associates, student interns and paralegal times (herein sometimes "para-attorney" times). The total attorney hours (attorney and para-attorney) on this case came to 7,599.50 and the total value of all such time amounted to $438,968.88.

The jury's verdict found (i) that all of the defendants, with the exception of the Board of Higher Education and its members, had considered plaintiff's association with the CIA in the determination to deny plaintiff's tenure and promotion, (ii) that such consideration was a substantial and motivating factor therein, (iii) that all of such defendants "knowingly acted in such a way as to cause, or contribute to the causation, of that result" and (iv) that defendants had failed to prove that the plaintiff would

have been denied tenure and promotion in the absence of such consideration.

All of the defendants raised the defense of qualified immunity by reason of their alleged good faith. The jury found that six defendants had proved their entitlement to this defense and that six individual defendants had not acted in good faith and the jury rendered a verdict and the Court entered a judgment against the latter six in the amount of $580,000.

In addition to all of the foregoing, plaintiff incurred disbursements and expenses in the amount of $60,065.83.

(i) On the first issue indicated above, namely, whether plaintiff is entitled to an award of reasonable attorneys' fees and expenses herein, § 1988 of Title 42 of

the United States Code provide in part that:

> "In any action or proceeding to enforce a provision of sections ... 1983, 1985, and 1986 of this title, ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs."

As plaintiff's attorneys point out in their memorandum Congress clearly intended that successful plaintiffs in actions brought under the Civil Rights Acts of 1871 should be able to recover attorneys fees just as successful plaintiffs are entitled to recover such fees under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a-3 and 2000e-5(k) and § 402 of the Voting Rights Act Amendments of 1975 (42 U.S.C. § 1973 1(e)).

In Senate Report in support of 42 U.S.C. §1988 (Senate Report No. 94-1011, reprinted in 1976 U.S.C., Cong. & Adm. News 5908, 5912)

the standard for awarding fees was described as follows:

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by [42 U.S.C. § 1988], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust'. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)".

Defense counsel seems to suggest that plaintiff in the case at bar should not be entitled to recover any attorneys fees because he prevailed on only one of his theories of recovery and only in money damages as against some of the individual defendants. Defense counsel either misunderstand or are deliberately attempting to confuse the clear answers given by the jury to the special interrogatories propounded to them in connection with their verdict.

The jury specifically found that all the defendants (except the members of the Board of Higher Education) caused or contributed to the causation of the deprivation of plaintiff's civil rights and thus that they violated 42 U.S.C. § 1983 and the jury further specifically found that the defendants failed to prove that the plaintiff would have been denied tenure had the CIA matter arisen. In short, plaintiff was and is entitled to full injunctive relief herein and would have received the same had he not withdrawn his request therefor in exchange for the full amount of the damages awarded to him by the jury. The fact that he recovered only on his §1983 claim and not on his claims based on other sections of Title 42, is wholly immaterial and irrelevant to the question of his entitlement to recovery of attorneys fees.

Defendants argue further that this is not the type of case in which attorneys fees should be awarded and that plaintiff's counsel initially undertook this matter pro bono publico and hence no award should be made for attorneys fees herein.

In principle, this case is indistinguishable from Stolberg v. Members of the Board of Trustees for the State Colleges of the State of Connecticut, 474 F. 2d 485, 490 (2d Cir. 1973). There the plaintiff, who had been denied tenure because of his opposition to the Vietnam War and because he had written letters protesting dismissal of faculty members of another college, predicated his claim upon the violation of his First Amendment rights. In that case the Second Circuit reversed that portion of the District Court's judgment

is denied an award of attorneys fees (474 F.2d at 490):

> "[T]he objective [of awarding reasonable attorneys' fees] is to assure that the plaintiff, and others who might similarly be forced to great expense to vindicate clear constitutional claims, are not deterred from securing such vindication by the prospect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants. * * *
>
> * * *
>
> "The circumstances of this case persuade us that an award of counsel fees is necessary to protect against the possibility that other faculty members might be reluctant to engage in activities protected by the First Amendment or might forgo the vindication of their rights to do so in a court of law."

Similarly, in Rabinovich v. Nyquist, 74 Civ. 1142 at n. 2 (EDNY, May 9, 1979), Chief Judge Curtin (sitting by designation) disposed of defense counsel's pro bono

publico argument in the following language:

> "[I]n response to the plaintiff's original motion for fees, the state filed a lengthy brief raising a number of arguments in opposition. Many of these were frivolous, such as the argument that attorneys who represent individual pro bono publico are not entitled to fees."

In view of all of the foregoing and all of the facts and circumstances herein, there is no question in this Court's mind that the plaintiff is entitled to recover his attorneys fee and disbursements in this action.

(ii) There are numerous factors which the courts have indicated a trial judge should take into account in determining the amount that should be awarded. In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), the Court of Appeals for the Fifth Circuit

listed the following:

(1) The time and labor required.
(2) The novelty and difficulty of the questions.
(3) The skill requisite to perform the legal service properly.
(4) The preclusion of other employment by the attorney due to acceptance of the case.
(5) The customary fee.
(6) Whether the fee is fixed or contingent.
(7) Time limitations imposed by the client or the circumstances.
(8) The amount involved and the results obtained.
(9) The experience, reputation, and ability of the attorneys.
(10) The "undesirability" of the case.
(11) The nature and length of the professional relationship with the client.
(12) Awards in similar cases.

In the same report referred to above, the Senate Committee stated that:

> "It is intended that the amount of fees awarded [under 42 U.S.C. 1988] be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature .... In computing the fee, counsel for prevailing parties

> should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'"

The Court has taken into consideration all of the foregoing factors and the above-quoted admonition by the United States Senate in its determination of the amount of the fees to be awarded in this case.

Engaging in what might be called "Monday morning quarterbacking" defense counsel suggest that no all of the work done by plaintiff's attorneys was necessary for the prosecution of this matter to a successful conclusion and that if a single practitioner had undertaken the task the same result could have been achieved at far less cost and expense. This Court, however, is not prepared to accept any such hypothesis. Defense counsel themselves consisted of a team

of three lawyers from the Corporation Counsel's office and a lawyer from The Board of Higher Education, all of whom appeared to be actively engaged throughout the trial in their unsuccessful defense of plaintiff's meritorious claims. It ill behoves defense counsel under such circumstances now to argue that one attorney could have achieved the same result on behalf of the plaintiff and that they should not have to pay for a comparable number of attorneys working against them throughout the litigation.

Assuming the time was necessarily expended[2] in the successful prosecution of the action, it is, as a practical

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2 Defendants have not produced any evidence (as distinguished from argument) that it was not and, in light of plaintiff's proof, the Court finds that it was.

matter, wholly irrelevant whether one attorney spent the total hours involved or several attorneys and para-attorneys did, as was the case with plaintiff's attorneys. According to plaintiff's attorneys records, they spent 5,481.25 hours of attorneys' time plus 2,118.25 hours of para-attorney[3] time. In accordance with their time charge rates, such time has a total value of $438,968.88. At $60 an hour, a single practitioner would receive approximately the same

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3 "Para-attorneys," consisting of summer associates, student interns and paralegals, perform, for the most part, work that has traditionally been done by lawyers, e.g., digesting depositions, collating, marking and indexing exhibits, preparing and arranging for service of subpoenas, etc. To the extent that such work is done by non-lawyers at lower time rates than would have been the case had the work been done by lawyers, the losing party benefits and has little cause to complain.

amount.

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4 The Court is aware of the fact that at least one Court in a patent infringement action disallowed under 35 U.S.C. §285 charges for services of law students and law school graduates who had not been admitted to practice in its award of reasonable attorneys fees in that "exceptional case" to the prevailing party saying that such charges were neither proper as "attorney fees" nor as separately stated costs and disbursements. CTS Corporation v. Electro Materials Corp. of America, ____ F. Supp. ____, Docket No. 70 Civ. 433 (SDNY, 8/16/79) 48 U.S. Law Week 2142.

In the instant case, as indicated in the text, the statute here (42 U.S.C. §1988) provides for "a reasonable attorney's fees." In this Court's view, however, the hourly rates for various personnel within a law firm merely serve as a guide in the determination of what constitutes such a "reasonable" fee. As also indicated in the text if a single practitioner had spent 7,599.50 hours on this case and the Court had determined his average time rate for legal, semi-legal and administrative work to be $60 an hour, he would have been entitled to an award of $455,970.00 or some $17,000 more than is claimed by the plaintiff here. In other words, and in short, a reasonable attorneys' fee for the work done in the case at bar appears, if anything, to be in excess of the amount claimed.

The Court therefore is not persuaded by defense counsel's arguments that plaintiff is not entitled to the amounts claimed; nor is it persuaded that the hourly rates charged by plaintiff's attorneys for partners, associates and para-attorneys time are unreasonable. Indeed, in light of comparable charges made by firms of plaintiff's law firm's stature and reputation, the stated time charges appear to be most reasonable and indeed, if anything quite modest.

The Court is not convinced, however, that plaintiff's attorneys should be entitled to their time charges in connection with the preparation and presentation of the instant motion for attorneys fees and has therefore deducted the same from the amount awarded herein.

Accordingly, plaintiff is entitled to and is hereby awarded recovery of reasonable attorneys' fees in the amount of $433,458.73 and disbursements in the amount of $60,065.83 and the judgment shall be amended so as to award him the same, together with such other costs as he shall be entitled to herein.

SO ORDRED.

_____

U.S.D.J.

No. 80-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Petitioners,

v.

MICHAEL I. SELZER,

Respondent.

RESPONDENT'S ACQUIESCENCE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER L. STRATTON
30 Rockefeller Plaza
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Attorney for Respondent

Of Counsel:

G. RUSSELL MILLER
RICHARD H. RUBIN

DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112

March 6, 1981

QUESTION PRESENTED

Whether a city college professor's one time communication of information to the Central Intelligence Agency was Constitutionally protected conduct, such that his colleagues, acting under color of state law, were not entitled to punish him therefor by depriving him of promotion and tenure.

TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Decision of the Second Circuit	3
Reasons for Respondent's Acquiescence to the Petition	4
Conclusion	6

TABLE OF AUTHORITIES

Hughes Tool Co. v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973)	4
50 U.S.C. § 403(d)(4)	5
National Security Council Intelligence Directive No. 2 (Feb. 17, 1972) (Published on microfiche in Declassified Documents Reference System as Item No. (76) 253D (Carrollton Press 1976))	5
S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976)	5

No. 80-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Petitioners,

v.

MICHAEL I. SELZER,

Respondent.

RESPONDENT'S ACQUIESCENCE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE[1]

In late 1975, Professor Michael I. Selzer requested the Central Intelligence Agency ("CIA") to furnish him with research materials pertinent to his academic pursuits. Dr. Selzer was then an untenured Assistant Professor in the Political Science Department at Brooklyn College, a branch of the City University of New York. Selzer's candidacy for promotion to Associate Professor and his candidacy for tenure were to be considered in the 1976-77 academic year.

The CIA rejected Selzer's request for data. However, when a New York City field representative of the CIA learned that Selzer was planning a research trip to Western

1. A more complete statement of the facts of this case is set forth in respondent's own petition for certiorari, No. 80-1335, filed on February 5, 1981.

Europe in the summer of 1976, he asked Selzer to consider reporting back to the CIA on any information of a military, scientific, technical, economic or political nature which Selzer might come by. (Tr. 625)

When Professor Selzer returned from his trip he decided to comply with the CIA's request. He did not think he had any significant information to report, and certainly nothing that would warrant a face-to-face meeting. Nevertheless, he telephoned the CIA's New York office. The substance of the telephone conversation was so trivial that the CIA agent discarded his notes, and neither he nor Selzer pursued the matters discussed any further. The entire conversation took less than 15 minutes.

When word of Selzer's contact with the CIA reached the individual petitioners, who were Selzer's colleagues in the Brooklyn College Political Science Department, they did not treat the incident as trivial. Almost immediately they launched a campaign to oust Selzer from the faculty because of what he had done.

First, they sought the commencement of disciplinary proceedings looking toward Selzer's dismissal. Failing in that effort, they then sabotaged Selzer's candidacies for tenure and promotion by changing their earlier endorsements of Selzer's credentials to criticism. The latter tactic proved successful, and Professor Selzer's employment at Brooklyn College was terminated.[2]

Professor Selzer brought suit under 42 U.S.C. § 1983. After eight weeks of trial (and three and a half days of deliberation) the jury found six of the twelve individual defendants liable. In response to special interrogatories, the jury found:

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2. Under the applicable regulations, denial of tenure to a faculty member in Professor Selzer's position, *i.e.*, who had received five consecutive one-year appointments to the rank of Assistant Professor, automatically terminated his employment at the end of the fifth year.

—that Professor Selzer's association with the CIA was a substantial factor in the decision to deny his applications for tenure and promotion;

—that Professor Selzer would have been granted tenure and promotion if his association with the CIA had not been considered;

—that the conduct of each of the twelve individual defendants had caused that result; and

—that these six individual petitioners (though not the other six defendants) had acted in bad faith.

After entry of judgment against the individual petitioners, the Board of Higher Education of the City of New York was substituted as the judgment debtor.

DECISION OF THE SECOND CIRCUIT

On appeal, the Second Circuit Court of Appeals divided two to one. The majority acknowledged the jury's findings as to why Selzer had been denied tenure but ignored the jury's clear findings as to who had caused that injury and which of the defendants had acted in bad faith. The majority ruled that the jury should have been interrogated even further[3] and reversed and remanded for a new trial. (As to all of which we respectfully refer the Court to respondent's own petition for certiorari, No. 80-1335.) Judge Kaufman concurred in the reversal, but he voted to dismiss the complaint on the ground that Selzer's conduct was not protected by the Constitution.

3. The majority held that the jury should have been interrogated separately as to each defendant as to whether he or she would have voted differently on Selzer's candidacies for tenure and promotion in the absence of any consideration of the CIA matter.

REASONS FOR RESPONDENT'S ACQUIESCENCE TO THE PETITION

The instant petition raises the important and unresolved federal question of the extent to which the Constitution protects a citizen's right to impart information to the Central Intelligence Agency. In particular, it raises the issue of whether a state (or persons acting under color of state law) may punish a citizen for voluntarily cooperating with a federally mandated program for the collection of foreign intelligence information.

The courts below assumed that Selzer's association with the CIA was protected by the Constitution, but they did not articulate the rationale for their assumption. Respondent submits that the lower courts' assumption was correct. Nevertheless, respondent acquiesces in the petition for certiorari so that this important issue may be resolved with the authority which only this Court can supply. Respondent further notes that the issue raised by this petition will dispose of the entire case if it is resolved in petitioners' favor.[4]

Respondent's acquiescence in the petition does not, of course, imply that he agrees with petitioners on the merits. The right of citizens voluntarily to provide information to their government is a brick in the foundation of the democratic system and should be regarded as an inherent right protected by the Constitution. Petitioners' argument that Selzer's association with the CIA was not a protected form of association is anomalous because it would permit per-

4. The record on this issue was developed during a lengthy trial and will not likely be further developed on remand. Since the precise issue now tendered may dispose of this case, it should be decided now, before the parties and the courts below are required to expend substantial amounts of time and effort on a lengthy retrial. *See, Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 392 (1973) (Burger, C. J., dissenting).

sons acting under color of state law to punish others for voluntarily cooperating with the lawful activities of a Federal government agency.

Petitioners also ignore the Federal government's clear interest in receiving foreign intelligence information pertinent to its obligation to provide for a secure national defense.[5] Members of the academic community have proven to be a valuable source of such information. *See,* S. Rep. No. 94-755, 94th Cong., 2d Sess. 189 (1976), in which a Select Senate Committee (the "Church Committee") expressly recognized the propriety of the CIA's program of debriefing academics and the benefit to the Federal government from such contacts. The result petitioners seek would frustrate that program.

Petitioners have proposed a balancing test which fails to take the Federal interest into account. Even if a balancing test were applicable, in addition to the parties' interests, the Federal government's interests would be an integral part of such a test. A balancing of all the necessary interests would, we respectfully submit, result in the conclusion that respondent's communication with the CIA was protected.

Finally, respondent notes that the important issues raised by his own petition, No. 80-1335, rest upon the premise that his conduct was Constitutionally protected. The issues in respondent's petition may also permit the Court to resolve the entire case if the Court holds that Selzer's conduct was

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5. The Federal government's interest is set forth in National Security Council Intelligence Directive No. 2 (Feb. 17, 1972) (published on microfiche in Declassified Documents Reference System as Item No. (76) 253D (Carrollton Press 1976)), which was promulgated pursuant to 50 U.S.C. § 403(d)(4). That directive states, in part:

> 7. The Central Intelligence Agency, as a service of common concern, shall be responsible for the selective exploitation within the United States of non-governmental organizations and individuals as sources of foreign intelligence information. . . .

so protected. Accordingly, respondent urges the Court to grant certiorari to consider the issues raised by both petitions.

CONCLUSION

For the reasons stated above, respondent acquiesces in the instant petition for certiorari.

Respectfully submitted,

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